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RIEF

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No. 16-___

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM,

Petitioner,

v.

MOODY INVESTORS SERVICE, INC., ET AL.,

Respondents.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This case presents two questions about whether, under *American Pipe & Construction Co. v. Utah*, 414 U.S. 538, 554 (1974), a member of a putative damages class can opt out of the class action and pursue its individual claims if the class action was timely, but the individual class member's complaint was filed more than three years after the offending conduct such that it could arguably be barred by a three-year statute of repose. The Second Circuit affirmed the dismissal of petitioner's claims as untimely, applying circuit precedent from a case in which this Court granted certiorari but did not reach the merits because the case settled. *See Police & Fire Ret. Sys. of Detroit v. IndyMac MBS, Inc.*, 721 F.3d 95 (2d Cir. 2013), *cert. granted sub nom., Pub. Emps.' Ret. Sys. of Miss. v. IndyMac MBS, Inc.*, 134 S. Ct. 1515 (2014), *cert. dismissed as improvidently granted*, 135 S. Ct. 42 (2014). Here, the court of appeals acknowledged a circuit split, and stated that "the Supreme Court is in the best position to resolve" these questions, which "implicate[] the very nature of *American Pipe* tolling."

The Questions Presented are:

1. Does the filing of a putative class action serve, under the *American Pipe* rule, to satisfy the three-year time limitation in Section 13 of the Securities Act with respect to the claims of putative class members? (Question granted in *IndyMac*)

2. May a member of a timely filed putative class action file an individual suit on the same causes of action before class certification is decided, notwithstanding the expiration of the relevant time limitations?

PARTIES TO THE PROCEEDING

The following respondents were defendants-appellees in the Second Circuit:

Moody's Investors Service, Inc., McGraw-Hill Companies, Inc., Moody's Corporation, Ernst & Young, LLP, Brian M. Clarkson, Michael Kanef, Moody's Investors Service, Inc., Fidelity Management Trust Company, ANZ Securities, Inc., Citigroup Global Markets Inc., RBC Capital Markets Corporation, ABN AMRO Incorporated, Williams Capital Group L.P., BBVA Securities Inc., Greenwich Capital Markets, Inc., SunTrust Capital Markets, Inc., CIBC World Markets Corp., HSBC Securities (USA) Inc., HVB Capital Markets, Inc., M.R. Beal & Company, BNP Paribas S.A., ING Financial Markets LLC, Mellon Financial Markets, LLC, Natixis Bleichroeder Incorporated, Santander Investment Securities Inc., SG Americas Securities Holdings, LLC, Wells Fargo Securities, LLC, National Australia Capital Markets, LLC, Caja De Ahorros y Monte De Piedad De Madrid, Harris Nesbitt Corp., DZ Financial Markets LLC, Fortis Securities, LLC, RBS Greenwich Capital, BMO Capital Markets Corp., Mizuho Securities USA, Inc., Muriel Siebert & Co., Inc., Scotia Capital (USA) Inc., Sovereign Securities Corporation, LLC, Utendahl Capital Partners, L.P., Bankia, S.A., Raymond McDaniel, Jr., RBS WCS Holding Company, Daiwa Capital Markets Europe Limited, BNY Capital Markets, Inc., Wachovia Capital Markets, LLC, BNY Mellon Capital Markets, LLC.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner California Public Employees' Retirement System ("CalPERS") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit (Pet. App. 1a-6a) is unpublished but available at 2016 WL 3648259. The relevant opinions of the district court (Pet. App. 7a-13a) are unpublished.

JURISDICTION

The judgment of the court of appeals was entered on July 8, 2016. Pet. App. 1a. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISION

Section 77m of Title 15 of the U.S. Code provides in relevant part:

> **Limitation of actions**
>
> No action shall be maintained to enforce any liability created under [Section 11] . . . unless brought within one year after the discovery of the untrue statement or the omission, or after such discovery should have been made by the exercise of reasonable diligence . . . . In no event shall any such action be brought to enforce a liability created under [Section 11] . . . more than three years after the security was bona fide offered to the public . . . .

STATEMENT OF THE CASE

In *Public Employees' Retirement System of Mississippi v. IndyMac MBS, Inc.*, 134 S. Ct. 1515 (2014), *cert. dismissed as improvidently granted*, 135 S. Ct. 42 (2014), this Court granted certiorari to decide how the doctrine of *American Pipe & Construction Co. v. Utah*, 414 U.S. 538 (1974), applies to securities claims subject to the three-year limitations period of Section 13 of the Securities Act of 1933. *American Pipe* held that "the commencement of a class action suspends the applicable statute of limitations as to all asserted members of the class who would have been parties had the suit been permitted to continue as a class action." *Id.* at 554. In *American Pipe* itself, this Court applied that rule to allow putative class members to intervene in a case after the district court denied class certification and the limitations period had run. Subsequently, this Court held the same rule applies when class members seek to file individual actions after class certification is denied. *See Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345 (1983).

In both cases, the defendants alleged the plaintiff's claims were untimely under a statute of limitations. *IndyMac* presented the question whether *American Pipe* tolling applies to a statute of repose as well. The Second Circuit had held that it did not, and this Court granted review. After this Court became aware that a tentative settlement was awaiting the district court's approval, however, it dismissed the case as improvidently granted. *See Pub. Emps.' Ret. Sys. of Miss. v. IndyMac MBS, Inc.*, 135 S. Ct. 42 (2014).

This case presents the opportunity to decide the question on which the Court granted certiorari in *IndyMac* and simultaneously resolve another circuit conflict over whether *American Pipe* applies when a class member files its individual suit *before* class certification is decided.

1. Prior to its bankruptcy in 2008, Lehman Brothers operated as a global investment bank whose stock traded on the New York Stock Exchange. Between July 2007 and January 2008, Lehman Brothers raised over $31 billion through debt offerings. Petitioner California Public Employees' Retirement System, the largest pension fund in the United States, purchased millions of dollars of those securities.

a. On June 18, 2008, another retirement fund filed a putative class action (the "Class Action") in the Southern District of New York. The complaint alleged that respondents, who were involved in underwriting the debt offerings, were liable under Section 11 for false and misleading statements in the registration statements. Among other things, the Class Action alleged that the registration statements contained untrue statements and omitted material facts concerning Lehman's accounting practices (including improperly removing tens of billions of dollars from its balance sheet), risk-management activities (including its accumulation of illiquid assets), and exposure to risky mortgage and real estate-related assets.

The Class Action asserted claims under Section 11 of the Securities Act of 1933, 15 U.S.C. § 77k, which imposes liability upon underwriters and others for untrue or misleading statements or omissions in a

registration statement. Section 11 claims are subject to the limitations period set forth in Section 13 of the Act, which states in relevant part:

> **Limitation of actions**
>
> No action shall be maintained to enforce any liability created under [Section 11] . . . unless brought within one year after the discovery of the untrue statement or the omission, or after such discovery should have been made by the exercise of reasonable diligence . . . . In no event shall any such action be brought to enforce a liability created under [Section 11] . . . more than three years after the security was bona fide offered to the public . . . .

15 U.S.C. § 77m.

It is undisputed that the Class Action was timely filed under this provision by a class representative with standing to assert the claim, and that petitioner was a proper member of the putative class.

In February 2011, more than three years after the securities were offered to the public but before the district court had decided whether to certify the class, petitioner elected to take charge of its own claims by filing a Section 11 suit against respondents in the Northern District of California. Complaint, *Cal. Pub. Emps.' Ret. Sys. v. Fuld*, No. 3:11-cv-00562-EDL (N.D. Cal. Feb. 7, 2011). The case was subsequently transferred to the Southern District of New York and consolidated with the Class Action for pretrial purposes by order of the U.S. Judicial Panel on Multidistrict Litigation. *See* MDL Transferred In,

Cal. Pub. Emps.' Ret. Sys. v. Fuld, No. 3:11-cv-01281-LAK (S.D.N.Y. Feb. 25, 2011).

Later that year, the parties to the Class Action reached a settlement and the district court preliminarily certified a class for settlement purposes under Federal Rule of Civil Procedure 23(b)(3). Upon receiving the court-ordered notice of the settlement, petitioner opted out to pursue its own claims individually.

The district court, however, dismissed petitioner's individual suit as untimely. Pet. App. 7a, 12a. In so doing, it rejected petitioner's argument that the pendency of the timely filed Class Action rendered CalPERS' individual lawsuit timely. *Id.* 10a-13a.

2. The Second Circuit affirmed. Pet. App. 6a. The court of appeals began by observing that it had "held previously that *American Pipe* tolling does not affect the statute of repose embodied in section 13," citing its decision in *IndyMac*. *Id.* 3a.

a. In *IndyMac*, retirement pension systems from Detroit and Wyoming filed separate putative class actions against the same defendant, alleging false and misleading statements in multiple offerings of mortgage-backed securities. When the cases were consolidated, Wyoming was appointed lead plaintiff and Detroit was left to be represented by Wyoming as a member of Wyoming's putative class. Wyoming then amended its complaint to include securities that Detroit had purchased but Wyoming had not. Approximately six months later, the district court determined that Wyoming did not have standing to assert claims on behalf of the class (including Detroit)

with respect to any security it had not itself purchased. When Detroit moved to intervene to assert those claims, the district court held it was too late – by then, Section 13's three-year limitations period had run on the claims and, the court held, *American Pipe* did not apply to toll it. *See* 721 F.3d at 102-03.

The Second Circuit affirmed. It began from the premise that Section 13's three-year limitations period established a statute of repose, not a statute of limitations. *See IndyMac*, 721 F.3d at 107. As such, the court believed, the three-year provision created a "*substantive* right in those protected to be free from liability after a legislatively-determined period of time." *Id.* at 106 (citation omitted). This mattered, the court believed, because "while statutes of limitations are often subject to tolling principles, a statute of repose *extinguishes* a plaintiff's cause of action after the passage of a fixed period of time" and therefore is not subject to equitable tolling. *Id.* (citations and internal quotation marks omitted). That is why, for example, in *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350 (1991), this Court had refused to apply equitable tolling to Section 13's three-year period of repose. *See IndyMac*, 721 F.3d at 109.

The question, then, was whether *American Pipe* had created a principle of *equitable* tolling that was presumptively inapplicable to a statute of repose, or a rule of *legal* tolling (*i.e.*, one based on the courts' interpretation of a statute or rule), which might apply. On that question, the Second Circuit acknowledged, the "Courts of Appeals are divided." *Id.* at 108 (citing cases from the Second, Fourth,

Ninth, Tenth, and Federal Circuits); *see also id.* ("Experienced and capable judges of the district courts in our Circuit have similarly drawn disparate conclusions and are without consensus.").

Rather than wade into that conflict, the Second Circuit instead concluded that it made no difference. On the one hand, if *American Pipe*'s "tolling rule is properly classified as 'equitable,' then application of the rule to Section 13's three-year repose period is barred by *Lampf*, which states that equitable 'tolling principles do not apply to that period.'" *IndyMac*, 721 F.3d at 109 (quoting *Lampf*, 501 U.S. at 363). But "[e]ven assuming, *arguendo*, that the *American Pipe* tolling rule is 'legal' – based upon Rule 23, which governs class actions – we nonetheless hold that its extension to the statute of repose in Section 13 would be barred by the Rules Enabling Act." *Id.* The court explained that the Rules Enabling Act provides that in issuing federal rules of practice and procedure, the courts "shall not abridge, enlarge or modify any substantive right." *Id.* (quoting 28 U.S.C. § 2072(b)). And while the Second Circuit recognized that this Court had rejected a Rules Enabling Act objection in *American Pipe* itself, *id.* at 109 n.17, it concluded Section 13's statute of repose was different because "Section 13 creates a *substantive* right," *id.* at 109.

The court acknowledged that "failure to extend *American Pipe* tolling to the statute of repose in Section 13 could burden the courts and disrupt the functioning of class action litigation." *Id.* But it believed that "sophisticated, well-counseled litigants" would find some unspecified way of avoiding those ills. *Id.* And if they did not, it was Congress's problem, not the courts'. *Id.* at 110.

b. In this case, the court of appeals concluded that *IndyMac* required dismissal of petitioner's complaint. The court did not dispute that unlike the situation in *IndyMac* itself, petitioner had filed its individual action during the pendency of a class certification motion that was ultimately granted. It acknowledged petitioner's argument that "because it fell within the putative class before exercising its right to opt out, its claims were essentially 'filed' against the defendant within three years and therefore timely." Pet. App. 4a. But the court found that argument precluded by the binding circuit precedent in *IndyMac*. To "the extent that CalPERS argues that *American Pipe* tolling should be conceptualized as something other than 'tolling' as that term is generally understood," the panel explained, "that argument was presented to the *IndyMac* panel, which declined to adopt it." *Id.* 4a-5a.

The court of appeals closed by acknowledging the need for this Court's review:

> [T]he question whether *American Pipe* tolling applies to statutes of repose – and if so, when – may be ripe for resolution by the Supreme Court. Our decision in *IndyMac* created a circuit split with the Tenth Circuit, and the issue implicates the very nature of *American Pipe* tolling, a question the Supreme Court is in the best position to resolve. . . . [U]nless and until the Supreme Court informs us that our decision was erroneous, *IndyMac* continues to be the law of the Circuit and its reasoning controls the outcome of this case.

Pet. App. 5a-6a (citations omitted).

REASONS FOR GRANTING THE WRIT

As the Second Circuit rightly recognized, this case calls out for the Court's review. It presents an opportunity to resolve two entrenched circuit conflicts over the application of *American Pipe & Construction Co. v. Utah*, 414 U.S. 538 (1974), to securities litigation. The first Question Presented replicates the question this Court granted certiorari to decide two terms ago in *IndyMac* but did not resolve. Since this Court dismissed that writ, the circuit split over whether *American Pipe* applies to statutes of repose has only expanded and become more entrenched. The second Question Presented – whether *American Pipe* applies when a member of a timely filed putative class action files an individual suit before class certification is decided – has likewise fractured the circuits for years.

Only this Court can resolve these conflicts because they are ultimately founded on a deep disagreement over the nature of *American Pipe*'s rule – specifically, whether it creates a rule of legal, as opposed to equitable, tolling (the first Question Presented), and whether it establishes only a tolling rule or also a definition of when a class member's claim is deemed filed for limitations purposes (the second Question Presented). Until this Court intervenes, those disagreements will continue to produce intolerable variations in class action practice to the detriment of defendants, alleged victims, and district courts across the country.

I. The Question The Court Granted Certiorari To Decide In *IndyMac* Remains Certworthy.

The years since this Court granted certiorari in *IndyMac* have done nothing but increase the need for review of the first Question Presented.

A. The Circuit Conflict Continues To Expand.

To start, the widely acknowledged[1] circuit conflict over *American Pipe*'s application to Section 13 and other statutes of repose has only grown, with the Sixth and Eleventh Circuits recently joining the pre-existing split.

1. *The Tenth Circuit Holds That* American Pipe *Applies To Section 13's Three-Year Period, While The Seventh And Federal Circuits Apply The Same Rule To Materially Indistinguishable Limitations In Other Statutes.*

a. The first circuit to address *American Pipe*'s application to Section 13's period of repose was the Tenth. In *Joseph v. Wiles*, 223 F.3d 1155, 1168 (10th

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[1] *See Dusek v. JPMorgan Chase & Co.*, No. 15-14463, – F.3d – , 2016 WL 4205857, at *3 (11th Cir. Aug. 10, 2016) (observing that "[c]ourts have disagreed over the basis for the Supreme Court's decision in *American Pipe*" and, as a consequence, over its application to statutes of repose); *Stein v. Regions Morgan Keegan Select High Income Fund, Inc.*, 821 F.3d 780, 792 (6th Cir. 2016) ("Our fellow Circuits are split."); *Hall v. Variable Annuity Life Ins. Co.*, 727 F.3d 372, 375 n.5 (5th Cir. 2013) (acknowledging division); *Albano v. Shea Homes Ltd. P'ship*, 634 F.3d 524, 535 (9th Cir. 2011) (same).

Cir. 2000), as in this case, a class action asserting Section 11 claims was timely filed in federal court. Later, after the expiration of Section 13's three-year limitations period, one of the class members filed his own suit. The initial class action was subsequently certified, but the individual suit was deemed untimely. On appeal, the Tenth Circuit reversed, holding that *American Pipe* saved the individual claim. *Id.* at 1166-68.

In particular, the court rejected the argument that *American Pipe* applied a principle of equitable tolling inapplicable to Section 13's statute of repose. For one thing, the court concluded that *American Pipe* was best viewed as applying legal, not equitable, tolling. The court explained that "[e]quitable tolling is appropriate where, for example, the claimant has filed a defective pleading during the statutory period, or where the plaintiff has been induced or tricked by his adversary's misconduct into allowing the filing deadline to pass." *Id.* at 1166 (citations omitted). "In contrast," the Tenth Circuit explained, *American Pipe* applied "legal tolling that occurs any time an action is commenced and class certification is pending." *Id.* at 1166-67. For that reason, the defendants' reliance on *Lampf v. Gilbertson*, 501 U.S. 350 (1991), was misplaced even if *Lampf* stood for the proposition that equitable tolling principles could never apply to a statute of repose. *Joseph*, 223 F.3d at 1166.

Lampf was also inapposite, the Tenth Circuit held, because it simply stated that "litigation . . . must be *commenced* . . . within three years after [a] violation." *Id.* at 1167 (quoting *Lampf*, 501 U.S. at 364) (first alteration in original). *American Pipe* had decided, however, that the filing of a class action

commences the litigation for all putative class members for purposes of any limitations period. *Id.* For that reason, "in a sense, application of the *American Pipe* tolling doctrine to cases such as this one does not involve 'tolling' at all." *Id.* at 1168.

At the same time, applying *American Pipe* to both time limits under Section 13 "serves the purposes of Rule 23." *Id.* at 1167. That rule, the court explained, "encourages judicial economy by eliminating the need for potential class members to file individual claims." *Id.* But if "all class members were required to file claims in order to insure the limitations period would be tolled, the point of Rule 23 would be defeated." *Id.* Moreover, the "notice and opt-out provision of Rule 23(c)(2) would be irrelevant without tolling because the limitations period for absent class members would most likely expire, 'making the right to pursue individual claims meaningless.'" *Id.* (citation and internal quotation marks omitted).

Finally, the Tenth Circuit recognized that the legislative purposes of Section 13's limitations periods were satisfied because once the class action was filed, "defendants were on notice of the substantive claim as well as the number and generic identities of potential plaintiffs." *Id.* at 1168.

b. The Tenth Circuit's holding in *Joseph* is consistent with decisions of the Seventh and Federal Circuits that have likewise concluded *American Pipe* applies to limitations periods that are otherwise not subject to equitable tolling.

In *Appleton Electric Co. v. Graves Truck Line, Inc.*, 635 F.2d 603 (7th Cir. 1980), the Interstate

Commerce Commission had invalidated a tariff that governed shipping prices charged by trucking companies to customers. One such customer sued under the Interstate Commerce Act on behalf of overcharged shippers, naming as defendants a class of trucking companies that had charged the invalidated rate. One of the members of the defendant class, Graves Truck Line, did not receive individual notice and an opportunity to opt out until after the statute of limitations had expired. *Id.* at 607. When Graves subsequently opted out, the plaintiff sued it individually, giving rise to the question whether the pendency of the class action had satisfied the limitations period against Graves. *Id.* at 607-08.

Appleton is relevant here because this Court had deemed the statute of limitations at issue in that case jurisdictional. 635 F.2d at 608 (citing 49 U.S.C. § 16(3)). And a jurisdictional limitations period shares the two features *IndyMac* and other cases have said render *American Pipe* inapplicable to statutes of repose: (1) a jurisdictional limitation is not subject to equitable tolling;[2] and (2) the running of the limitations period "not only bars the remedy but also destroys the liability." *Id.*; *see also IndyMac*, 721 F.3d at 106.

Accordingly, the Seventh Circuit faced the same essential question as the Tenth Circuit in *Joeseph* and the Second Circuit in *IndyMac*: whether these

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[2] *See, e.g.*, *John R. Sand & Gravel Co. v. United States*, 552 U.S. 130, 134 (2008); *Cada v. Baxter Healthcare Corp.*, 920 F.2d 446, 451 (7th Cir. 1990).

features precluded applying *American Pipe* to save the plaintiff's claims. Like the Second Circuit in *IndyMac*, the Seventh Circuit viewed the case as presenting a "conflict between the operation of the statute of limitations and Rule 23." *Appleton*, 635 F.2d at 609. But unlike the Second Circuit, the Seventh resolved that perceived conflict in favor of "'effectuat[ing] . . . the purpose of litigative efficiency and economy,' (which Rule 23 was designed to perform)." *Id.* (quoting *Am. Pipe*, 414 U.S. at 556). It held that "where a class action suit is instituted against a class of unnamed defendants . . . the statute of limitations is tolled as to all putative members of the defendant class." *Id.* at 609-10. "A contrary rule would sound the death knell for suits brought against a defendant class, nullifying that part of Rule 23 that specifically authorizes such suits." *Id.* at 610. "Plaintiffs would, in each case, be required to file protective suits, pending class certification, to stop the running of the statute of limitations." *Id.* In a case like the one before it, the court observed, that would result "in the filing of a staggering number of complaints." *Id.* At the same time, applying *American Pipe* to a jurisdictional time limit "was not truly inconsistent with the operation of the statute of limitations." *Id.* at 609.

The Federal Circuit likewise has concluded that *American Pipe* applies to jurisdictional time limitations. In *Bright v. United States*, 603 F.3d 1273 (Fed. Cir. 2010), that court considered application of *American Pipe* to the jurisdictional limitations period for the Tucker Act, 28 U.S.C. § 2501. 603 F.3d at 1287. The Federal Circuit held that *American Pipe* applied because it applies a legal, not an equitable,

tolling rule. *Id.* at 1287-88. A contrary conclusion would create a class action process that was "so cumbersome and unwieldy" that it would "frustrat[e] the purpose of avoiding multiplicity of suits." *Id.* at 1289.

2. The Second, Sixth, And Eleventh Circuits Refuse To Apply American Pipe *To The Securities Act's Periods Of Repose.*

The Second, Sixth, and Eleventh Circuits disagree. As discussed, the Second Circuit in *IndyMac* reasoned that Section 13 created a statute of repose to which *American Pipe* could not be applied consistent with the Rules Enabling Act. *See* Pet. App. 3a (citing *IndyMac*, 721 F.3d at 95).

The Sixth Circuit recently reached the same conclusion. In *Stein v. Regions Morgan Keegan Select High Income Fund, Inc.*, 821 F.3d 780 (6th Cir. 2016), the Sixth Circuit acknowledged that its "fellow Circuits are split" over *American Pipe*'s application to Section 13's three-year limitations period. *Id.* at 792. But after examining both the Tenth and Second Circuit's reasoning, the Sixth Circuit concluded that "*IndyMac* has the more cogent and persuasive rule." *Id.* at 793.[3]

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[3] In those circuits that have no governing circuit precedent, district courts have reached conflicting decisions, although the overwhelming majority has held that *American Pipe* applies to Section 13 and other statutes of repose. *See Arivella v. Lucent Techs., Inc.*, 623 F. Supp. 2d 164, 177-78 (D. Mass. 2009) (collecting citations); Petition for a Writ of Certiorari at 17-18,

Most recently, the Eleventh Circuit likewise found the reasoning of the Sixth and Second Circuits more persuasive. *Dusek v. JPMorgan Chase & Co.*, No. 15-14463, – F.3d –, 2016 WL 4205857 (11th Cir. Aug. 10, 2016). The plaintiffs in *Dusek* brought claims under Section 20(a) of the Securities Exchange Act, which is subject to the limitations period of 28 U.S.C. § 1658(b). The Eleventh Circuit explained that, like Section 13, Section 1658(b) has been "construed by courts as having a two-year statute of limitations and a five-year period of repose." *Dusek*, 2016 WL 4205857, at *2. The court then examined the reasoning of *Joseph*, *IndyMac*, and *Stein*. *Id.* at *3-4. After recounting that "[t]he district court ultimately relied on these decisions in determining that the *American Pipe* rule is one of equitable tolling," the Eleventh Circuit affirmed and held "that *American Pipe* tolling does not apply to the statute of repose at issue in th[at] case." *Id.* at *5.

B. *IndyMac* Was Wrongly Decided.

Review of the first Question Presented is also warranted because the Second Circuit's decision in *IndyMac* is wrong.

Pub. Emps.' Ret. Sys. of Miss. v. IndyMac MBS, Inc., No. 13-640 (Nov. 22, 2013).

1. American Pipe *Did Not Establish A Rule Of Equitable Tolling Inapplicable To A Statute Of Repose.*

First, there is no basis for the Second Circuit's suggestion that *American Pipe* created the kind of equitable tolling inapplicable to a statute of repose.

Unlike equitable tolling, which generally is available at a judge's discretion "when a litigant has pursued his rights diligently but some extraordinary circumstance prevents him from bringing a timely action," *CTS Corp. v. Waldburger*, 134 S. Ct. 2175, 2183 (2014); *Holland v. Florida*, 560 U.S. 631, 649 (2010), this Court has made clear that *American Pipe* tolling applies to all class members, whether or not they have paid attention to the suit or diligently pursued their rights, *see Am. Pipe*, 414 U.S. at 551-52.

That is because the rule of *American Pipe* was derived not from equity, but from this Court's interpretation of Rule 23, which was promulgated through an exercise of this Court's rulemaking authority under the Rules Enabling Act, 28 U.S.C. § 2072. Applying ordinary tools of legal interpretation – rather than equitable balancing – the Court examined the text, history, and purposes of the rule. *Am. Pipe*, 414 U.S. at 453-56. The Court was "convinced that the rule most consistent with federal class action procedure must be that the commencement of a class action suspends the applicable statute of limitations as to all asserted members of the class who would have been parties had the suit been permitted to continue as a class action." *Id.* at 554.

This "interpretation" of Rule 23 was "necessary to insure effectuation of the purposes of litigative efficiency and economy that the Rule in its present form was designed to serve." *Id.* at 555-56 (emphasis added). The Court reaffirmed that *American Pipe* was an interpretation of Rule 23 in *Chardon v. Fumero Soto*, 462 U.S. 650 (1983), explaining that in *American Pipe*, it had "*interpreted the Federal Rules of Civil Procedure* to permit a federal statute of limitations to be tolled between the filing of an asserted class action and the denial of class certification," *id.* at 654 (emphasis added), to achieve the "federal interest in assuring the efficiency and economy of the class action procedure," *id.* at 661.

2. *Applying* American Pipe *To Section 13 Does Not Contravene The Rules Enabling Act.*

The Second Circuit also erred in concluding that applying *American Pipe* to Section 13 would violate the Rules Enabling Act. The court reasoned that the Act prohibits applying the federal rules in a way that would "abridge, enlarge, or modify any substantive right," 28 U.S.C. § 2072(b). It then concluded that, as a statute of repose, Section 13 "creates a *substantive* right, extinguishing claims after a three-year period." *IndyMac*, 721 F.3d at 109. "Permitting a plaintiff to file a complaint or intervene after the repose period" had run, the court concluded, "would therefore necessarily enlarge or modify a substantive right and violate the Rules Enabling Act." *Id.* That reasoning fails for several reasons.

First, *American Pipe* itself rejected the premise that the Rules Enabling Act prohibits any application

of a rule that can be said to affect substantive rights. 414 U.S. at 557-58.[4] The question "is not whether a time limitation is 'substantive' or 'procedural,' but whether tolling the limitation in a given context is consonant with the legislative scheme." *Id.* "[T]he mere fact that a federal statute providing for substantive liability also sets a time limitation upon the institution of suit does not restrict the power of the federal courts to hold that the statute of limitations is tolled under certain circumstances not inconsistent with the legislative purpose." *Id.* at 559.

The same is true of Section 13's statute of repose. The question is whether applying *American Pipe* to actions like this one is consistent with the statute's purposes – if it is, then applying it invades no substantive right of a defendant but rather reflects that Congress never intended defendants to be free from liability to the class members whose claims were timely filed under the rule.

Second, applying the correct standard, *American Pipe* is consistent with the Rules Enabling Act

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[4] *IndyMac* also overstated the degree to which Section 13's three-year limitations period establishes a materially more substantive right than its one-year statute of limitations, which the court acknowledged was subject to *American Pipe*. The statutory text does not expressly extinguish or confer any rights, nor does it forbid tolling. In fact, the language of these provisions is no more absolute than the Clayton Act's limitations provision at issue in *American Pipe*, which stated that an action "shall be forever barred" if not commenced in time. 15 U.S.C. § 15b. If that language did not extinguish rights in the manner of a statute of repose, it is difficult to see why the language of Section 13 does.

because it is entirely consonant with the Securities Act's limitations scheme.

Language. Section 13 requires that any Section 11 action "be brought" within three years after the security was offered to the public. 15 U.S.C. § 77m. "'Brought' in this context means 'commenced.'" *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Manning*, 136 S. Ct. 1562, 1568 (2016) (quoting *Brought*, Black's Law Dictionary (3d ed. 1933)). And in *American Pipe*, this Court held that "a timely class action complaint commences the action for all members of the class as subsequently determined." 414 U.S. at 550. That interpretation of the statute is supported by the provision's use of the passive voice – no action "shall . . . be brought," 15 U.S.C. § 77m – which encompasses a representative bringing a suit on another's behalf. By refusing to address the question more specifically than that, Congress left it to the courts to decide how the provision would apply to representative actions (including class actions). *American Pipe* took up that responsibility, answering the question by sensibly considering the rules governing and purposes behind class action litigation.

Purposes. Applying *American Pipe* to Section 13 is also consistent with the legislative purposes of the Securities Act. "Limitations periods are intended to put defendants on notice of adverse claims and to prevent plaintiffs from sleeping on their rights, but these ends are met when a class action is commenced." *Crown, Cork & Seal*, 462 U.S. at 352 (citation omitted). Moreover,

> a class complaint "notifies the defendants not only of the substantive claims being brought against them, but also of the number and

> generic identities of the potential plaintiffs who may participate in the judgment." The defendant will be aware of the need to preserve evidence and witnesses respecting the claims of all the members of the class.

Id. (quoting *Am. Pipe*, 414 U.S. at 555).

"Statutes of repose also encourage plaintiffs to bring actions in a timely manner, and for many of the same reasons." *CTS Corp.*, 134 S. Ct. at 2183. In addition, statutes of repose "effect a legislative judgment that a defendant should be free from liability after the legislatively determined period." *Id.* *American Pipe* is entirely consistent with that purpose because it guarantees that after the limitations period has expired, no liability will be imposed beyond that claimed in lawsuits filed on or before that date.

Of course, litigation over those timely filed claims may well continue long after the period of repose has expired. There is no argument, for example, that the policy of repose is violated when a defendant is held liable to members of a timely filed class action in a case certified after the limitations period has run. But the purpose of a statute of repose is not to provide defendants complete certainty as to the scope of their liability, but instead to fix the *outer limit* of their *potential* liability. *American Pipe* simply informs defendants that this outer limit includes possible liability to members of putative class actions filed within the statute of repose. Whether that liability is resolved through a certified class action or through individual suits by class members is irrelevant as far as the policies underlying the statute of repose are concerned.

Practical Consequences. Congress could not possibly have intended the intolerable results that would arise if *American Pipe* did not apply to Section 13 or other statutes of repose.

The Second Circuit did not deny that refusing to apply *American Pipe* to Section 13's period of repose would have exactly the same effects this Court found untenable in *American Pipe* itself. In many cases, a final class certification decision may not take place until years after the limitations period has expired – particularly when suit is filed close to the end of the limitations periods or if class issues are appealed.[5] In light of this reality, under *IndyMac*, "[p]otential class members would be induced to file protective motions to intervene or to join in the event that a class was later found unsuitable," thereby "breed[ing] needless

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[5] A recent study found that that ruling on class certification takes three years or longer in more than one-third of cases. *See* Svetlana Starykh & Stefan Boettrich, *Recent Trends in Securities Class Action Litigation: 2015 Full-Year Review* 20 (2016), http://www.nera.com/content/dam/nera/publications/2016/2015_Securities_Trends_Report_NERA.pdf; *see also, e.g.*, *Erica P. John Fund, Inc. v. Halliburton Co.*, 309 F.R.D. 251, 255 (N.D. Tex. 2015) (class certification order issued more than ten years after securities issued); *Fort Worth Emps.' Ret. Fund v. J.P. Morgan Chase & Co.*, 301 F.R.D. 116, 123-24 (S.D.N.Y. 2014) (approximately seven years); *In re Merck & Co., Inc. Sec., Derivative & "ERISA" Litig.*, No. MDL 1658 (SRC), 2013 WL 396117, at *1 (D.N.J. Jan. 30 2013) (approximately nine years); Final Judgment & Order of Dismissal at 2, *In re McKesson HBOC, Inc. Sec. Litig.*, No. 5:99-cv-20743 (N.D. Cal. Apr. 13, 2007) (approximately eight years); Order Granting in Part Lead Plaintiff' Second Renewed Motion for Class Certification at 2, *In re Xerox Sec. Litig.*, No. 3:99-cv-2374 (AWT) (D. Conn. Sept. 30, 2008) (same).

duplication of motions." *Am. Pipe*, 414 U.S. at 553-54.

The Second Circuit's rule also dramatically augments the cost of class litigation. Each potential opt-out plaintiff incurs the additional expense to retain counsel, file an individual complaint, and then monitor all of the activity in the entire litigation.[6] Defendants must likewise pay their counsel to monitor and respond to the many duplicative pleadings and redundant briefing *IndyMac* prompts. The courts must expend substantial additional effort to manage all the complaints and deal with each party's counsel. Everyone – the courts, plaintiffs, and defendants – must bear the added expense of discovery addressing each of the various claims individually.

And all for no conceivable purpose. Under the *IndyMac* rule, sophisticated plaintiffs will file protective individual actions, providing no real benefit to either defendants or the judicial system. At the same time, class members who are less sophisticated or well-resourced predictably will forfeit their claims if class certification is denied. While defendants would benefit from this injustice, they

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[6] In this respect, *IndyMac* undermines the design of the Private Securities Litigation Reform Act, which requires securities class actions to be helmed by a single, sophisticated lead plaintiff – as opposed to a collection of plaintiffs advancing a flotilla of complaints. *See* 15 U.S.C. § 78u-4(a)(3). The rule of *IndyMac* predictably balkanizes almost every high profile action, as multiple institutional (and other sophisticated) investors will file their own suits to avoid the prospect that befell the plaintiffs in *IndyMac* and this case.

cannot claim that this windfall amounts to a substantive right Congress intended Section 13 to bestow.

Constitutional Avoidance. Refusing to apply *American Pipe* to statutes of repose would raise grave constitutional questions.

"In the context of a class action predominantly for money damages," this Court has "held that absence of notice and opt-out violates due process." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 363 (2011) (citing *Phillips Petrol. Co. v. Shutts*, 472 U.S. 797, 812 (1985)). But the constitutional right to opt out would be illusory if opting out simply provided an individualized opportunity to have one's claims immediately dismissed as untimely. *See Crown, Cork & Seal*, 462 U.S. at 351-52 (recognizing the need for the opt-out right to remain meaningful even after the limitations period has run); *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 176 & n.13 (1974) (same). Yet, under *IndyMac*, in a great many cases, class members' opt-out rights arise only after a statute of repose has expired. *See supra* 22 & n.5. In the Class Action, for example, the district court did not rule on class certification until more than four years after the suit was filed.[7] As a result, opt-out notices were not sent until well after Section 13's three-year limitations period. In this common circumstance, *IndyMac* renders the opt-out right meaningless – the

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[7] *See* Pet. App. 10a (noting that Class Action was filed on October 27, 2008); Pretrial Order No. 59 (Class Certification Ruling), *In re Lehman Bros. Sec. & ERISA Litig.*, No. 1:08-cv-05523-LAK-GWG (S.D.N.Y. Jan. 23, 2013).

only way for class members to have any chance of vindicating their legal rights is to remain members of the class.

The burden on class members' due process opt-out right is even greater in cases involving multiple different claims with different limitations periods. Assume, for example, that a class complaint states claims under Section 11 of the 1933 Securities Act (subject to Section 13's three-year statute of repose) and also under Section 10(b) of the 1934 Act (subject to a five-year period under 28 U.S.C. § 1658(b)). As in this case, the class is certified and proceeds toward settlement. If the limitations period has run on the Section 11 claims but not the Section 10(b) claims, then individual plaintiffs who wish to pursue their Section 10(b) claims on their own are in a predicament because they cannot opt out *in part. Thus, they can either remain in the class – accepting* a settlement of all of their claims and forgoing their right to litigate the Section 10(b) claims as they see fit – or they can opt out, in which case their Section 11 claims will be time-barred.

The constitutional right to opt out is based in "our deep-rooted historic tradition that everyone should have his own day in court." *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 846 (1999) (quotation marks omitted). A rule that permits class members to opt out but not pursue their own individual claims does just as much violence to this tradition as simply prohibiting plaintiffs from opting out. Accordingly, even if the Rules Enabling Act could be read to prohibit applying *American Pipe* to Section 13, the Act must yield to the superior demands of the Due Process Clause.

II. The Court Should Decide Whether A Limitations Period Can Bar A Class Member From Filing Its Own Action During The Pendency Of A Proper And Timely Class Action.

Even if the Court agrees with the Second Circuit that *American Pipe* tolling does not apply to Section 13's three-year limitation, it should hold that petitioner's claims were timely asserted because they were initially presented within the limitations period by the Class Action complaint and then maintained continuously thereafter, first by the class representative on petitioner's behalf and later by petitioner itself in its own lawsuit. On this understanding, no tolling was required and the Rules Enabling Act is not implicated.

In reviewing this argument, the Court could resolve both the proper application of Section 13 in a substantial portion of cases in which the defense arises and a related, multifaceted circuit conflict.

A. Members Of Pending, Timely Filed Putative Class Actions May File Their Own Suits Despite The Running Of The Statute Of Limitations Or Repose.

In *IndyMac* and *American Pipe* itself, the class member waited until class certification was denied before attempting to intervene or file a new action. In other cases, including this one, a class member has sought to file its own action *before* the district court rules on class certification but after the relevant statute of limitations and/or repose has expired. In such circumstances, tolling is not required because

the class member's action was timely commenced and maintained without interruption.

Although the *American Pipe* rule is frequently referred to as a "tolling" rule, it also reflects a pragmatic understanding of what it means to commence a suit for purposes of satisfying a limitations period in the special context of a class action. The Court explained that under the modern rules governing class actions, "the difficulties and potential for unfairness which, in part, convinced some courts to require individualized satisfaction of the statute of limitations by each member of the class, have been eliminated." *Am. Pipe*, 414 U.S. at 550. The Court thus declared that "there remain no conceptual or practical obstacles in the path of holding that the filing of a timely class action complaint *commences the action for all members* of the class as subsequently determined." *Id.* (emphasis added).

Therefore, "when an unnamed, putative class member later files its own individual claim, it is not instituting a new action subject to the statute of limitations and statute of repose; it is simply taking over the prosecution of its individual claim from the putative class representative." *In re BP p.l.c. Sec. Litig.*, No. 4:13-cv-1393, 2014 WL 4923749, at *4 (S.D. Tex. Sept. 30, 2014). As the Tenth Circuit has repeatedly observed, "in a sense, application of the *American Pipe* tolling doctrine to cases such as this one does not involve 'tolling' at all." *Joseph*, 223 F.3d at 1168.

That conception of this case finds support not only in *American Pipe* but also in the Due Process Clause, which guarantees individual class members

the right to opt out of a class and pursue their own claims with their own attorneys. *See Wal-Mart*, 564 U.S. at 363.

Moreover, no other timing rule makes sense. For example, it would make no sense to hold that unnamed class members' claims are "brought" only once the class is certified, because certification often occurs after the limitations period has run, and no court holds that the unnamed class members' claims are time-barred in that circumstance.

Here, petitioner's claims were presented by a class representative within Section 13's time limits. That class was entirely proper and eventually certified. When petitioner exercised its constitutional right to control its own litigation and have its own day in court, it simply "retook the reins from" the class representatives who "pre-filed [petitioner's] suit" when they brought their timely putative class action. *State Farm Mut. Auto. Ins. Co. v. Boellstorff*, 540 F.3d 1223, 1233 (10th Cir. 2008).[8] Petitioner's suit was therefore timely even without tolling.

There is no plausible Rules Enabling Act objection to this resolution of the case, which turns on

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[8] Tolling may be required when, as in *American Pipe* or *IndyMac*, a class member seeks to assert claims substantially *after* class certification has been denied, if there is a material period of time after the expiration of the limitations period during which the member has no pending claims (*i.e.*, no claim by virtue of the class action complaint and no individual complaint yet filed). For the reasons given in Section I.B, *supra*, to the extent tolling is required in those circumstances, *American Pipe* supplies it, whether the limitations period is viewed as a statute of limitations or a statute of repose.

an interpretation of when an action is "brought" within the meaning of Section 13 rather than anything in the federal rules. Nor, in any event, does this interpretation abridge any "substantive right" of the defendant. Respondents in this case, for example, would have had no grounds to challenge the timeliness of petitioner's claim if petitioner had remained a member of the Class Action. Instead, respondents object only to petitioner pursuing its claim individually rather than through the class. But nothing in Section 13 or the Rules Enabling Act gives defendants a "substantive right" to force a plaintiff to litigate its Section 11 claim through a class representative.

B. The Circuits Are Divided Over When Members Of A Timely Filed Class Action May File Their Own Lawsuits.

Granting certiorari on the second Question Presented would not only ensure the Court fully addressed the issue presented by this case and many others like it, but would also provide the Court an opportunity to resolve another enduring circuit conflict over the meaning and application of *American Pipe*. Specifically, the circuits are divided multiple ways over when, if ever, a plaintiff in petitioner's position can file its own suit after the relevant limitations periods have run.

1. *The Tenth Circuit Holds That The Filing Of A Putative Class Action Constitutes Filing Of Each Individual's Claim For Purposes Of Both The Statute Of Limitations And The Statute Of Repose.*

In *Boellstorff*, 540 F.3d 1223, the Tenth Circuit considered whether *American Pipe* "applies when an individual member of a putative class pursues an independent, individual claim before the district court has decided the class certification issue but after a non-tolled statute of limitations would have run." *Id.* at 1224. Recognizing that the "four circuits that have offered opinions on the issue have split evenly," *id.*, the Tenth Circuit held that "a plaintiff who chooses to bring an individual action while the class action is pending can still claim the benefit of the *American Pipe* tolling doctrine," *id.* at 1230.

Despite referring to *American Pipe* "tolling," the Tenth Circuit recognized that "in a sense, application of the *American Pipe* tolling doctrine to cases such as this one does not involve 'tolling' at all." *Boellstorff*, 540 F.3d at 1232 (quoting *Joseph*, 223 F.3d at 1168). The court explained:

> The class action mechanism's inherent representativeness means that each putative class member "has effectively been a party to an action" against the defendant "since a class action covering him" was filed. [*Joseph*, 223 F.3d at 1168]. *American Pipe* made much of this principle, positing that the class action tolling doctrine would apply regardless of the reliance or awareness of putative class members. 414 U.S. at 551-52. Thus, when Clark filed a class action against State Farm

> in August 2000, alleging the same claims later asserted by Boellstorff, Clark in essence pre-filed Boellstorff's suit. Thereafter, when Boellstorff filed her independent suit she simply retook the reins from Clark.

Id. at 1232-33 (parallel citation omitted).[9]

In reaching this conclusion, the court relied on its prior decision in *Joseph*, which, as discussed earlier, applied the same rule to Section 13's statute of repose, *see supra* 10-12. Accordingly, in the Tenth Circuit, neither Section 13's statute of limitations nor its statute of repose bars class members from pursuing an individual action before class certification is decided, so long as the class action was timely filed.

2. *The First And Sixth Circuits Hold The Opposite.*

The First and Sixth Circuits take the opposite position, holding that every individual suit filed after the running of a statute of limitations or repose is untimely if filed before class certification is resolved.

In *Glater v. Eli Lilly & Co.*, 712 F.2d 735 (1st Cir. 1983), the First Circuit reasoned that "*American Pipe*

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[9] The plaintiff in *Boellstorff* brought state law claims subject to Colorado's version of Rule 23. But because "neither the Colorado Supreme Court nor any Colorado appellate court ha[d] spoken to the instant issue," the Tenth Circuit "anticipate[d] that the Colorado Supreme Court would, as we do, find persuasive the reasoning of" federal cases holding a class member's suit timely when filed during the pendency of a timely filed putative class action. *Boellstorff*, 540 F.3d at 1228.

says nothing about" a class member's "ability to maintain a separate action while class certification is still pending." *Id.* at 739. It further concluded that "[t]he policies behind Rule 23 and *American Pipe* would not be served, and in fact would be disserved, by guaranteeing a separate suit at the same time that a class action is ongoing." *Id.* Although the case involved a statute of limitations bar, the reasoning would apply *a fortiori* to the stricter requirements of a statute of repose. *See id.*

In *Stein*, 821 F.3d 780, the Sixth Circuit staked out the same position. The court explained that under its decision in *Wyser-Pratte Management Co. v. Telxon Corp.*, 413 F.3d 553 (6th Cir. 2005), "a plaintiff who chooses to file an independent action without waiting for a determination on the class certification issue may not rely on the *American Pipe* tolling doctrine." *Stein*, 821 F.3d at 789 (quoting *Wyser-Pratte*, 413 F.3d at 568). The Court "recognize[d] that *Wyser-Pratte* now represents the minority rule." *Id.* (citing contrary decisions from the Second, Ninth, and Tenth Circuits). But the fact "[t]hat several of our fellow Circuits chose not to follow our reasoning does not make *Wyser-Pratte* any less binding." *Id.* With respect to certain claims filed after class certification was denied, the Sixth Circuit embraced *IndyMac*'s rejection of *American Pipe* tolling for Section 13's statute of repose. *See supra* 15.

3. The Second Circuit Has Split The Baby.

The Second Circuit has taken yet a third course, holding that *American Pipe* preserves the timeliness

of a class member's individual suit under a statute of limitations, but not a statute of repose.

The plaintiffs in *In re WorldCom Securities Litigation*, 496 F.3d 245 (2d Cir. 2007), filed their own securities fraud complaints after the statute of limitations had run but during the pendency of a timely filed putative class action of which they were members. *Id.* at 248-51. The Second Circuit held their claims timely under *American Pipe*. It explained that the "theoretical basis" of *American Pipe* was that "members of the asserted class are treated for limitations purposes as having instituted their own actions." *Id.* at 255. Accordingly, "at least so long as they continue to be members of the class, the limitations period does not run against them during that time." *Id.* That conclusion did "not undermine the purposes of statutes of limitations," because "the initiation of a class action puts the defendants on notice of the claims against them." *Id.* At the same time, the "*American Pipe* tolling doctrine was created to protect class members from being *forced* to file individual suits in order to preserve their claims" not to "induce class members to forgo their right to sue individually." *Id.* at 256.

In contrast, *IndyMac* precluded petitioner from following the same course in this case because it is governed by a statute of repose rather than a statute of limitations. Pet. App. 3a.

4. The Ninth Circuit Has Held Statutes Of Limitations Are No Bar, But Has Not Addressed Statutes Of Repose.

Finally, the Ninth Circuit has held that *American Pipe* applies to toll a statute of limitations

in a case like this but has not addressed whether the same rule applies to a statute of repose. *See In re Hanford Nuclear Reservation Litig.*, 534 F.3d 986, 1008-09 (9th Cir. 2007).

III. This Case Presents The Court An Unparalleled Vehicle To Resolve These Important Questions That Have Bedeviled The Courts Of Appeals.

This case presents this Court an exceptional opportunity to resolve the two related and important questions this petition presents.

A. The Questions Presented Are Important.

As the expanding circuit conflicts demonstrate, the need for this Court's review has only intensified in the two-and-a-half years since it granted certiorari in *IndyMac*. During that short time, *American Pipe*'s applicability to periods of repose has determined the outcome in numerous securities cases, some of which involve alleged frauds that inflicted massive injuries on the public. *See, e.g.*, *Dusek*, 2016 WL 4205857, at *1, *5 (arising out of Madoff Ponzi scheme); *In re LIBOR-Based Fin. Instruments Antitrust Litig.*, No. 11 MDL 2262 NRB, 2015 WL 6243526, at *4, *138 (S.D.N.Y. Oct. 20, 2015) (arising out of LIBOR manipulation); *In re BP*, 2014 WL 4923749, at *2, *4 (arising out of Deepwater Horizon disaster).[10] The

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[10] *See also, e.g.*, *Dekalb Cty. Pension Fund v. Transocean Ltd.*, 817 F.3d 393, 413-14 (2d Cir. 2016), *petition for cert. docketed*, 16-206 (Aug. 15, 2016); *SRM Glob. Master Fund Ltd. P'ship v. Bear Stearns Cos.*, No. 14-507-cv, 2016 WL 3769735, at

Second Circuit hears a disproportionate number of those cases, increasing the need for prompt correction of its erroneous rule.[11]

The harmful consequences of *IndyMac* in the circuits that follow its rule is reason enough to grant review. But the lingering uncertainty for litigants in other circuits that have not yet decided whether *American Pipe* applies to statutes of repose is just as untenable. In those jurisdictions, potential securities plaintiffs are forced to guess whether they must file their own protective lawsuits to safeguard against the possibility that class certification in a pending action will be denied (or granted, then overruled on appeal) after the limitations period has run. If they guess wrong, genuine injuries and blatant frauds may go unaddressed. If they act conservatively, they will burden the courts with duplicative pleadings and redundant briefing that serve no real-world purpose.

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*2 (2d Cir. July 14, 2016); *Friedman v. JP Morgan Chase & Co.*, No. 15-cv-5899 (JGK), 2016 WL 2903273, at *9 (S.D.N.Y. May 18, 2016), *appeal docketed*, No. 16-1913 (2d Cir. June 15, 2016); *Dusek v. JPMorgan Cha e & Co.*, 132 F. Supp. 3d 1330, 1350 (M.D. Fla. 2015); *N. Sound Capital LLC v. Merck & Co.*, Nos. 3:13-cv-7240 (FLW)(DEA), 3:14-cv-7241 (FLW)(DEA), 3:13-cv-242 (FLW)(DEA) & 3:14-cv-241 (FLW)(DEA), 2015 WL 5055769, at *6-8 (D.N.J. Aug. 26, 2015); *In re Regions Morgan Keegan Sec., Derivative & ERISA Litig.*, Nos. 2:13-cv-02841-SHM-dkv & 2:09-2009-SHM-dkv, 2015 WL 10713983, at *3 (W.D. Tenn. July 31, 2015). *Prudential Ins. Co. of Am. v. Bank of Am., Nat'l Ass'n*, 14 F. Supp. 3d 591 (D.N.J. 2014); *Nat'l Credit Union Admin. Bd. v. Morgan Stanley & Co.*, No. 13 Civ. 6705(DLC), 2014 WL 241739, at *7 (S.D.N.Y. Jan. 22, 2014).

[11] *See* Starykh & Boettrich, *Recent Trends*, *supra*, at 9.

The passage of time has also reinforced that further percolation would serve no purpose and only exacerbate the harms caused by the present circuit conflict. The Eleventh Circuit's recent decision, for example, did little more than recite the conflicting reasoning of the courts in the split and pick a side. *See Dusek*, 2016 WL 4205857, at *3-5.

B. This Case Presents An Exceptional Vehicle To Resolve Both Circuit Conflicts.

This case presents an opportunity to resolve both circuit splits arising from the continuing uncertainty about the scope and nature of *American Pipe*'s rule. The facts of the case squarely present both questions, as petitioner filed its individual suit prior to class certification but more than three years after the securities were offered to the public. The suit was dismissed only because the Second Circuit refused to either toll the limitations period or find it satisfied by the timely filed class action. Pet. App. 3a-5a. Moreover, petitioner presented, and the Second Circuit squarely decided, both questions. *Id.*

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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September 22, 2016

APPENDIX

APPENDIX A

15-1879-cv
In re Lehman Bros. Sec. & ERISA Litig.

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 8th day of July, two thousand sixteen.

PRESENT: RALPH K. WINTER,
RICHARD C. WESLEY,
GERARD E. LYNCH,
Circuit Judges.

IN RE LEHMAN BROTHERS SECURITIES AND ERISA LITIGATION,

No. 15-1879

FOR APPELLANT:

THOMAS C. GOLDSTEIN, Goldstein & Russell, P.C., Bethesda, MD (Joseph D. Daley, Robbins Geller Rudman & Dowd LLP, San Diego, CA; Amanda M. Frame, Robbins Geller Rudman & Dowd LLP, San Francisco, CA, *on the brief*).

FOR APPELLEE:

VICTOR L. HOU (Mitchell A. Lowenthal, Roger A. Cooper, Jared Gerber, *on the brief*), Cleary Gottlieb Steen & Hamilton LLP, New York, NY.

Appeal from the United States District Court for the Southern District of New York (Kaplan, *J.*).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the orders of the District Court are **AFFIRMED**.

The California Public Employees' Retirement System ("CalPERS") appeals from two orders of the United States District Court for the Southern District of New York (Kaplan, *J.*), which dismissed certain of CalPERS's claims as time-barred by the three-year

statute of repose contained in section 13 of the Securities Act of 1933, 15 U.S.C. § 77m. We assume the parties' familiarity with the underlying facts and the procedural history, which we reference only as necessary to explain our conclusions.

The crux of the appeal is whether the Supreme Court's decision to toll statutes of limitation for putative class members—generally referred to as "*American Pipe* tolling" after the originating case, *American Pipe & Construction Co. v. Utah*, 414 U.S. 538 (1974)—also applies to section 13's statute of repose. We have held previously that *American Pipe* tolling does not affect the statute of repose embodied in section 13. *See Police & Fire Ret. Sys. of City of Detroit v. IndyMac MBS, Inc.*, 721 F.3d 95 (2d Cir. 2013). Undaunted, CalPERS urges us to distinguish this case from IndyMac. We are unpersuaded.

CalPERS argues principally that, unlike in *IndyMac*, the putative class action was commenced by a named plaintiff with proper standing and, therefore, its claims were actually asserted within the three-year statute of repose. This argument is inconsistent with the reasoning of *IndyMac*. *IndyMac* made no reference to the standing of named plaintiffs when it concluded that *American Pipe* tolling did not apply to section 13's statute of repose; its conclusion was instead derived from two longstanding principles. First, if *American Pipe* is grounded in equity, its tolling rule cannot affect a legislatively enacted statute of repose. *See IndyMac*, 721 F.3d at 109 (citing *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350, 363 (1991)). Second, if

American Pipe establishes a "legal" tolling principle grounded in Rule 23, to apply it to a statute of repose would violate the Rules Enabling Act by permitting a procedural rule to abridge the substantive rights created by statutes of repose. *Id.* at 106, 109. Accordingly, under *IndyMac*'s reasoning, the inapplicability of *American Pipe* tolling to a statute of repose turns on the nature of the tolling rule and its ineffectiveness against statutes of repose, not whether the named plaintiffs have proper standing to assert claims on behalf of a class. *See also CTS Corp. v. Waldburger*, 134 S. Ct. 2175, 2187 (2014) ("[A] critical distinction between statutes of limitations and statutes of repose is that a repose period is fixed and its expiration will not be delayed by estoppel or tolling." (internal quotation marks omitted)).

CalPERS suggests that because it fell within the putative class before exercising its right to opt out, its claims were essentially "filed" against the defendant within three years and therefore timely. Again, we are not persuaded. As a fundamental matter, if it were true that a putative class member's claims were essentially "filed" in the putative class complaint, there would be no need for *American Pipe* tolling at all; any putative class complaint would count as a legitimate "filing" of all putative class members' claims within the limitations period. The very principle of tolling is to permit claims *not* timely asserted to proceed if the requirements for suspending the limitations period are met. *Cf. Lozano v. Montoya Alvarez*, 134 S. Ct. 1224, 1231–32 (2014); *Honda v. Clark*, 386 U.S. 484, 496–97 (1967). To the

extent that CalPERS argues that *American Pipe* tolling should be conceptualized as something other than "tolling" as that term is generally understood, that argument was presented to the *IndyMac* panel, which declined to adopt it. *See* Joint Br. & Special App. for Intervenors-Appellants at 21–23, 25, *IndyMac*, No. 11-2998 (2d Cir. Nov. 2, 2011), ECF No. 116.

CalPERS finally argues that to find its claims to be time-barred violates the due process considerations embodied in Rule 23's opt-out mechanism. We are unpersuaded. The due process protections of Rule 23 are directed at preventing a putative class member from being bound by a judgment without her consent. *See Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 175–76 (1974). In essence, the optout right merely ensures that each putative class member retains the ability to act independently of the class action if she so elects. *Cf. In re WorldCom Sec. Litig.*, 496 F.3d 245, 256 (2d Cir. 2007). The opt-out right does not confer *extra* benefits to a plaintiff's independent action. CalPERS's right to initiate and pursue an individual action before, during, and after the putative class action was unchanged—including the necessity of instituting such an action within section 13's three-year statute of repose.

In closing, we note that the question whether *American Pipe* tolling applies to statutes of repose—and if so, when—may be ripe for resolution by the Supreme Court. Our decision in *IndyMac* created a circuit split with the Tenth Circuit, *see Joseph v. Wiles*, 223 F.3d 1155, 1166–68 (10th Cir. 2000), and

the issue implicates the very nature of *American Pipe* tolling, a question the Supreme Court is in the best position to resolve. Indeed, the Court initially granted certiorari to review *IndyMac* itself, *see Pub. Emps. Ret. Sys. of Miss. v. IndyMac MBS, Inc.*, 134 S. Ct. 1515 (2014), but dismissed the writ as improvidently granted, *see* 135 S. Ct. 42 (2014), two weeks after a motion for settlement approval was filed in the district court, *see In re IndyMac MBS Litig.*, No. 09 Civ. 4586 (S.D.N.Y. Sept. 11, 2014), ECF No. 532. However, unless and until the Supreme Court informs us that our decision was erroneous, *IndyMac* continues to be the law of the Circuit and its reasoning controls the outcome of this case.

We have considered all of Appellant's arguments and find them to be without merit. For the reasons stated above, the orders of the District Court are **AFFIRMED**.

FOR THE COURT:

Catherine O'Hagan Wolfe, Clerk

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

In re:

LEHMAN BROTHERS SECURITIES AND ERISA LITIGATION

This document applies to:

The California Public Employees' Retirement System v. Richard S. Fuld, Jr, et al., 11 Civ. 1281 (LAK)

PRETRIAL ORDER NO. 73
***(Calpers-* Response to Pretrial Order No. 70)**

LEWIS A. KAPLAN, *District Judge.*

The Bank Defendants' motion to dismiss the complaint (MDL Dkt. 557 and 11 Civ. 1281 Dkt. 28) is reinstated and granted as to all Securities Act claims for all securities except those issued in the May 2008 offering substantially for the reasons stated in movants' response to Pretrial Order No. 70 (MDL Dkt. 1265 and 11 Civ. 1281 Dkt 112).

SO ORDERED.

Dated: August 9, 2013

/s/ Lewis A. Kaplan
Lewis A. Kaplan
United States District Judge

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

In re:

LEHMAN BROTHERS SECURITIES AND ERISA LITIGATION

This document applies to:

The California Public Employees' Retirement System v. Richard S. Fuld, Jr, et al., 11 Civ. 1281 (LAK)

PRETRIAL ORDER No. 39
(HVB Motion to Dismiss)

LEWIS A. KAPLAN, *District Judge.*

Plaintiff California Public Retirement System ("CalPERS"), in its second amended complaint ("SAC"),[1] asserts a single claim against HVB Capital Markets Inc. ("HVB") under Section 11 of the Securities Act of 1933 (the "Securities Act"). HVB moves to dismiss the claim,[2] arguing that it is (1)

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[1] DI 551.

[2] DI 598, at 3.

time-barred, and (2) premised on allegations previously dismissed by the Court in its opinion dismissing in part the related class action complaint in *In re Lehman Brothers Equity/Debt Securities Litigation ("E/D Class Action").*[3]

Plaintiffs Section 11 claim against HVB is based on HVB's alleged participation in two offerings, dated July 12, 2007, and December 17, 2007.[4] CalPERS filed its original complaint on February 25, 2011.[5] Plaintiffs Section 11 claim against HVB is thus barred by the Securities Act's three-year statute of repose.[6]

Plaintiff argues that the filing of the amended complaint in the *E/D Class Action* on October 27, 2008 tolled the statute of repose under *American Pipe & Construction Co. v. Utah.*[7] It claims that its Section 11 claim against HVB therefore is timely. Plaintiff is incorrect.

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[3] *In Re Lehman Brothers Sec. and ERISA Litig.,799* F. Supp.2d 258 (S.D.N.Y. 2011) (hereinafter *"E/D Class Action I"*).

[4] ¶ 38; DI 705, at 5.

[5] DI 1 in 11 Civ. 1281.

[6] 15 U.S.C. § 77m.

[7] 414 U.S. 538.

This Court previously has held that *American Pipe* tolling does not apply to the statute of repose set forth in Section 13 of the Securities Act,[8] which clearly states that "[i]n no event shall any ... action be brought to enforce a liability created under [Section 11] more than three years after the security was bona fide offered to the public."[9] Plaintiff attempts to distinguish this Court's prior rulings by pointing out that they involved cases in which proposed intervenors attempted to cure standing defects of named plaintiffs.[10] By contrast, in this action, CalPERS - at one time a member of the putative class that had standing to sue - later opted out of the class action. This distinction, plaintiff argues, renders the Court's prior determination that *American Pipe* tolling does not apply to Section 13's statute of repose inapplicable here.

Plaintiff's argument merits little discussion. "[N]either *American Pipe* nor any other form of tolling may be invoked to avoid the three year statute of repose set forth in Section 13 of the Securities

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[8] *In re Lehman Bros. Sec. & Erisa* Litig., 800 F. Supp. 2d 477, 482 (S.D.N.Y. 2011); *In re IndyMac Mortgage-Backed Sec.* Litig., 793 F. Supp. 2d 637, 643 (S.D.N.Y. 2011).

[9] 15 U .S.C. § 77m.

[10] DI 705, at 6-7.

Act."[11] Section 13 "states quite clearly that' [i]n no event' shall ... claims be asserted 'more than three years after' the pertinent offerings. That language is absolute."[12] Nowhere in the statute is there an exception for claims brought by a plaintiff who has opted out of a class action.[13] And, given the frequency with which opt-out actions are filed in situations such as this one, such an exception would seriously undermine the statute and threaten to swallow the rule. The Court declines so to limit its prior rulings on this issue.

Because plaintiff brought its Section 11 claim against HVB more than three years after the

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[11] *E/D Class Action I,* 799 F. Supp.2d at 310.

[12] *In re Lehman,* 800 F. Supp. 2d at 477 (quoting 15 U.S.C. § 77m).

[13] Moreover, despite plaintiffs contention to the contrary, the fact that the named plaintiffs in the Court's prior decisions on this issue lacked standing had no bearing on the Court's analysis in those cases. The Court simply applied the statute as written and found that it is not subject to *American Pipe* tolling. *See In re Lehman,* 800 F. Supp. 2d at 482-83; *In re IndyMac,* 793 F. Supp. 2d at643.

securities over which it sues were offered to the public, its claim is untimely and must be dismissed.[14]

Conclusion

HVB's motion to dismiss [DI 596] - to the extent it is asserted against the SAC in this case - is granted. This ruling, however, disposes only of HVB's motion to dismiss CaLPERS' complaint as against it.

SO ORDERED.

Dated: October 15, 2012

/s/ Lewis A. Kaplan
Lewis A. Kaplan
United States District Judge

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[14] The motion is directed also at cases and pleadings that are not dealt with in this order and to that extent remains pending.